Supreme Court, U.S.
FILED
JUN 6 2000
CLERK

(3)

No. 99-1718

In The

Supreme Court of the United States

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Petitioner,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Third Circuit

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

The Respondent ("Zurich") erroneously argues that the Third Circuit based its ruling on an interpretation of Virgin Islands law pursuant to its supervisory powers. That suggestion is incorrect. The District Court found the insurance policy in question to be ambiguous, as did the Third Circuit (App. 12, 23). Thus, this case did not involve the construction of the policy language, but instead involved the analysis of extrinsic evidence to determine the intent of the parties as to the meaning of the policy language, which is a factual inquiry subject to a clearly erroneous standard.

While Zurich argues that the parties to the contract "all agreed" as to its meaning, the District Court considered and rejected this argument based upon the facts before it. In this regard, the District Court found the testimony of Zurich's underwriter on this point "to not be credible," particularly since it was contrary to his prior written statements (App. 31- 32). The District Court also gave no weight to the trial testimony of HOVIC's witnesses as "these individuals had not been involved in the negotiation of the policy, and most if not all of them had not even seen the policy" (App. 32). Similarly, the District Court relied heavily on the broker's written analysis of the policy exchanged between the parties during contract negotiations (referenced as Exhibit IIA) which clearly stated that the policy provided coverage for all contractors at the site (App. 30-31), which would include Meridian. Contrary to Zurich's repeated suggestions in its opposition brief, this broker never testified otherwise.

Notwithstanding these findings, Zurich argues that the Third Circuit merely applied Virgin Islands law pursuant to § 202(5) of the *Restatement (Second) of Contracts*, which permits contract interpretation to give consideration to the parties' course of dealings in the performance of the contract. However, the District Court did consider § 202 in its opinion (App. 38) and then found that the "testimony regarding the administration of the policy after it was executed was insufficient" to overcome the other trial evidence regarding the clear intention of the parties in negotiating the policy (App. 38-39). Thus, to find that § 202(5) was dispositive of this question, the Third Circuit had to find that the District Court's factual findings discounting the weight and credibility of this testimony was clearly erroneous, which it did not do.

Indeed, comment (a) to § 202 states that its provisions are "guidelines in the process of interpretation" and comment (g) expressly admonishes that " 'practical construction' is not conclusive of meaning" (App. 71). Moreover, § 202(1) provides that "if the principal purpose of the parties is ascertainable it is given great weight" (App. 70). However, § 202 outlines various "aids to contract interpretation" and no single factor is necessarily dispositive, as the ultimate issue of intent is a fact question where the contract is ambiguous. This fact finding process necessitated by the ambiguous language of the Zurich policy distinguishes this case from the three cases cited by Zurich, which involved the interpretation of state law for which the standard of review is plenary, rather than an analysis of the extrinsic evidence for which the standard of review is clearly erroneous under Rule 52(a).

Likewise, Zurich cannot and does not argue that the Third Circuit's alternate findings that (1) HOVIC and Zurich amended the policy and (2) that Meridian's rights had not vested prior to this alleged amendment were *de novo* findings. Instead, Zurich simply argues that the trial record supports these conclusions. However, as these issues were never raised at the trial level, it can hardly be argued that the trial record was ever developed regarding an amendment to the policy or when Meridian's rights vested. In any event, this Court has admonished the appellate courts not to make such *de novo* findings. In short, if these issues were critical, then certainly they should have been raised at the trial level in the first instance rather than in a summary matter on appeal.

While Zurich characterizes this petition as "frivolous" and the arguments as "astonishing," the District Court reached its decision only after denying two motions for summary judgment, holding a bench trial and issuing detailed findings of fact and conclusions of law. Absent a finding by the Third Circuit that these factual findings were clearly erroneous and unsupported by the record, the District Court's ruling must stand.

Even if this case involves a "garden variety" insurance dispute, the Third Circuit failed to follow this Court's clear mandate in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Unfortunately, only this Court can address these errors. However, the strict adherence to the mandate of Rule 52(a) is essential to the administration of

our judicial system. As such, it is respectfully submitted that a writ of certiorari should be issued in this case.

Respectfully submitted,

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